IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 4:05-cv-00329-TCK-PJC**
	)	
TYSON FOODS, INC., *et al.*,	)	
	)	
Defendants.	)	

DEFENDANTS' JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' DAMAGES CLAIMS PREEMPTED OR DISPLACED BY CERCLA AND INTEGRATED BRIEF IN SUPPORT

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The undersigned Defendants respectfully move the Court for an order of partial summary judgment as to Plaintiffs' claims for damages under Counts 4 (nuisance) and 6 (trespass), and for summary judgment as to Plaintiffs' Count 5 (federal common law nuisance), Count 10 (unjust enrichment, restitution or disgorgement), and general demand for punitive and exemplary damages (Second Amended Complaint ("SAC") Part VI, ¶ 5). Each seeks an award that exceeds the recovery permitted pursuant to the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§ 9601-75 ("CERCLA"), and is therefore preempted.

As the Tenth Circuit explained in *New Mexico v. General Electric*, 467 F.3d 1223, 1244 (10th Cir. 2006), CERCLA establishes a nationwide, comprehensive remedial scheme for addressing allegations of natural resources damages ("NRD") arising in whole or in part from the release of CERCLA-designated hazardous materials. That scheme limits damages for such injuries to the CERCLA-covered remedies of repair, replacement, or purchase of the equivalent of the contaminated natural resource. *Id.* at 1247; *see* 42 U.S.C. § 9607(f)(1). This scheme conserves for use in remediation assets that might otherwise be dissipated in NRD litigation. *New Mexico*, 467 F.3d at 1244, 1248. To that end, "CERCLA's comprehensive NRD scheme preempts any state remedy designed to achieve something other than the restoration, replacement, or acquisition of the equivalent of a contaminated natural resource." *Id.* at 1247.

Plaintiffs' essential claim in this litigation is that the agricultural application of poultry litter has resulted in a release of what they allege to be CERCLA-covered hazardous substances, which has in turn "caused injury to the [Illinois River Watershed ("IRW")], including the biota, lands, waters and sediments therein." SAC ¶¶ 1, 57, 60-61. Plaintiffs press state law claims for *inter alia* nuisance, trespass, and unjust enrichment, seeking to recover injunctive and remedial relief, past and future money damages, costs, and expenses, restitution and disgorgement, and

punitive and exemplary damages arising from those alleged injuries. SAC ¶¶ 97-107, 118-26, 139-46, Part VI, ¶¶ 1-5. State law does not restrict Plaintiffs' use of any amounts recovered in this litigation in a manner consistent with the limits outlined by CERCLA. *See* 62 Okla. Stat. § 7.1.B. Indeed, Plaintiffs have repeatedly stated their view that they are free to do with any recover as they will, including satisfying their substantial obligation to their private counsel, a use prohibited by CERCLA's NRD remedial scheme. The fact is that Plaintiffs have not articulated any real plan for applying the hundreds of millions of dollars they seek. Simply put, Plaintiffs assert state law claims seeking massive money damages for purported NRDs allegedly caused by CERCLA-covered hazardous materials without any binding and legally enforceable commitment that such monies will be use only to repair, replace or purchase the equivalent of the allegedly contaminated natural resources as required by CERCLA.

Defendants previously moved pursuant to *New Mexico* to dismiss under Rule 12(b)(6) identical claims contained in Plaintiffs' First Amended Complaint. The Court acknowledged the likelihood that under *New Mexico* "if CERCLA does apply … punitive damages are out[,] attorney fees are questionable, [and] federal common law is out." Ex. 1 (Jun. 14, 2007 Hrg. T. at 6). Nevertheless, the Court concluded that Defendants' motion was premature pending resolution of whether CERCLA applies at all in this case, and denied the motion with leave to refile. Ex. 2 (Jun. 15, 2007 Hrg. T. at 78-79).

The parties have now completed discovery and have briefed summary judgment as to Plaintiffs' CERCLA claims. As explained *infra*, the SAC carries forward the deficiencies under *New Mexico* previously identified in Plaintiffs' First Amended Complaint. Moreover, discovery and briefing now confirm that Plaintiffs remain fully committed to seeking unrestricted costs and damages through state-law causes of action for claimed NRDs purportedly caused by alleged

CERCLA-covered hazardous substances. Plaintiffs' state law claims are therefore subject in whole or in part to the CERCLA preemption as set forth in *New Mexico*. Accordingly, Defendants renew their motion and petition the Court for partial or full summary judgment as to: (a) Plaintiffs' demand for damages under Counts 4 and 6, (b) Counts 5 and 10 in their entirety, and (c) Plaintiffs' general demand for punitive and exemplary damages, SAC, Part VI, ¶ 5.

STATEMENT OF UNDISPUTED MATERIAL FACTS

The matters presented in this brief are pure issues of pleading and law. Plaintiffs assert that poultry litter contains hazardous substances (as that term is defined by CERCLA), that these substances have been released into the environment from a CERCLA facility, and that Plaintiffs have incurred response costs as a result. SAC ¶¶ 1, 57, 60-61, 75. These allegations invoke CERCLA's bar on state-law remedies for the same claims. *New Mexico*, 467 F.3d at 1244, 1248. As context for this motion, Defendants respectfully set out the following undisputed facts.

1. Plaintiffs' retained expert Dr. Berton Fisher has testified that Plaintiffs lack evidence of any injury caused by any substances allegedly released from poultry litter except phosphorus and bacteria. *See* Ex. 3 (Fisher Depo. at 451:7-11) ("[T]he only contaminants of concern [to Plaintiffs] in the [IRW] are phosphorus and bacteria."); *id.* (Fisher Depo. at 516:9-17, 615:4-616:19). Plaintiffs' retained expert Dr. Todd King has testified that Plaintiffs did not consider heavy metals, arsenic, or estradiol in evaluating remedies in this case. *See* Ex. 4 (King Depo. at 69:20-71:3, 81:21-25).

2. Plaintiffs have refused to be bound by this testimony of their retained experts. In opposing Defendants' motion for summary judgment on CERCLA, Plaintiffs have asserted that they have a viable CERCLA claim addressing "phosphorus, nitrogen, arsenic, zinc and copper (and compounds thereof)." State of Oklahoma's Response in Opposition to "Defendants' Joint

Motion for Summary Judgment on Counts 1 and 2 of the Second Amended Complaint ("CERCLA Opposition"), Dkt. #1913 at ¶ 4 (Mar. 9, 2009).

LEGAL STANDARDS

A. Summary Judgment

"Summary judgment … is an important procedure 'designed to secure the just, speedy and inexpensive determination of every action.'" *Culp v. Sifers*, 550 F. Supp. 2d 1276, 1281 (D. Kan. 2008) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). Summary judgment is appropriate where "there is no genuine issue as to any material fact and … the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Where the movant shows the "absence of a genuine issue of material fact, the non-movant may not rest on its pleadings but must set forth specific facts showing a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." *Sierra Club v. Seaboard Farms*, 387 F.3d 1167, 1169 (10th Cir. 2004).

B. Preemption

The Supremacy Clause, art. VI, cl. 2, nullifies state laws that "interfere with, or are contrary to the laws of Congress." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824). Specifically, state laws are preempted if (1) Congress explicitly requires preemption; (2) federal legislation is so pervasive as to occupy a regulatory field; (3) state and federal laws conflict to the point of making compliance with both impossible; or (4) state law undermines or serves as an obstacle to the full accomplishment of congressional goals. *United States v. City & County of Denver*, 100 F.3d 1509, 1512 (10th Cir. 1996). Preemption is not limited to entire claims and their accompanying remedies. Rather, CERCLA preempts a state law claim if "that claim, or any portion thereof, stands as an obstacle to the accomplishment of congressional objectives as encompassed in CERCLA." *New Mexico*, 467 F.3d at 1244.

Preemption issues should be resolved before a claim is entertained on the merits. *See*

Sprietsma v. Mercury Marine, 537 U.S. 51, 55-56 (U.S. 2002); *Meyer v. Conlon*, 162 F.3d 1264, 1268 (10th Cir. 1998); *Monarch Cement Co. v. Lone Star Indus.*, 982 F.2d 1448, 1451 (10th Cir. 1992). Similarly, whether a state law claim is preempted by federal law does not depend on the successful adjudication of the preempting federal claim. *New Mexico*, 467 F.3d at 1237 (state claims preempted by CERCLA despite prior dismissal of preempting CERCLA claim). Preemption questions should be resolved on summary judgment. *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1172 (9th Cir. 2001); *Indus. Truck Ass'n, Inc. v. Henry*, 125 F.3d 1305, 1308 (9th Cir. 1997). Generally, "[w]here the summary judgment movant argues that a state law claim is preempted by federal law, determination of material facts is not necessary, as the motion presents only a legal question. *Dobbs v. Anthem Blue Cross & Blue Shield*, 475 F.3d 1176, 1177 (10th Cir. 2007). Thus, summary judgment is appropriate as to a claim which a court determines is preempted." *Dobbs v. Wyeth Pharm.*, 530 F. Supp. 2d 1275, 1278 (W.D. Okla. 2008).

ARGUMENT

For nearly four years, Plaintiffs have pleaded federal and state claims that stand in irreconcilable tension. The time has come, however, for Plaintiffs to be bound by their evidence and pleadings. With discovery closed, Plaintiffs have made clear that in their view, their state law claims rest on grounds clearly pre-empted under CERCLA's comprehensive NRD scheme. They cannot continue to have it both ways. *Sprietsma*, 537 U.S. at 55-56; *Anthem Blue Cross & Blue Shield*, 475 F.3d at 1177; *City of Auburn*, 260 F.3d at 1172; *Meyer*, 162 F.3d at 1264; *Monarch Cement*, 982 F.2d at 1451 (9th Cir. 2001); *Wyeth Pharm.*, 530 F. Supp. 2d at 1278. In *New Mexico*, the Tenth Circuit held that CERCLA preempts any effort to use state law to recover damages for a natural resource injury caused in whole or in part by a CERCLA-covered hazardous substance. Plaintiffs' case, as pleaded and as presented, runs foursquare into this

prohibition, and is therefore legally deficient and preempted.

A. CERCLA Preemption Under *New Mexico v. General Electric*

1. CERCLA Preempts Any State Remedy Designed To Achieve Something Other Than The Restoration, Replacement, Or Acquisition Of The Equivalent Of A Contaminated Natural Resource

CERCLA liability arises from the "release … of a hazardous substance." 42 U.S.C. § 9607(a)(4). CERCLA defines a "hazardous substance" as those that EPA has determined "may present substantial danger to the public health or welfare or the environment." *Id.* §§ 9601(14), 9602(a). EPA has promulgated a list of such substances. *See* 40 C.F.R. § 302.4. Those linked to such a release may be held liable for, *inter alia*, "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release." 42 U.S.C. § 9607(a)(4)(C).

CERCLA expressly limits the damages that a State may recover under § 9607(a)(4)(C) for NRDs caused by the release of a CERCLA-covered hazardous substance:

> Sums recovered by a State as trustee under this subsection shall be available for use *only* to restore, replace, or acquire the equivalent of such natural resources by the State. The measure of damages in any action under subparagraph (C) of subsection (a) of this section shall not be limited by the sums which can be used to restore or replace such resources. There shall be no double recovery under this chapter for natural resource damages, including the costs of damage assessment or restoration, rehabilitation or acquisition for the same release and natural resource.

42 U.S.C. § 9607(f) (emphasis added). By this provision, "[t]he *measure* and *use* of damages arising from the release of hazardous waste is restricted to accomplishing CERCLA's essential goals of restoration or replacement, while also allowing for damages due to interim loss of use." *New Mexico*, 467 F.3d at 1244-45 (emphasis in original); *see also* 43 C.F.R., Part 11 (regulating how a trustee should define, quantify, and value natural resource damages, create a restoration

account, and design a restoration plan).[1]

The question in *New Mexico* was what effect this restriction has on state law claims seeking to recover NRDs in excess of or for uses other than those allowed by CERCLA. The Tenth Circuit acknowledged that "Congress did not intend CERCLA to completely preempt state laws related to hazardous waste contamination." *Id.* at 1244.[2] Nevertheless, the Tenth Circuit recognized that a state remedy is "conflict pre-empted" when it "stands as an obstacle to the accomplishment of congressional objectives as encompassed in CERCLA." *Id.*

Turning to Congress's objectives, the Tenth Circuit concluded that CERCLA creates a "comprehensive damage scheme which addresses damages assessment for natural resource injury, damage recovery for such injury, and use of such recovery." *Id*. at 1244. Unlike the tort claims Oklahoma presses in this case, CERCLA was not designed to compensate injured parties monetarily. "'The ultimate purpose of any [CERCLA] remedy should be to protect the public interest in a healthy functioning environment, and *not to provide a windfall to the public*

[1] Tellingly, Oklahoma's natural resource damages trustees have never even attempted to develop a natural resource damages use plan that complies with CERCLA's requirements. *See, e.g.*, Ex. 5 (Strong Depo. at 67:23-69:25, 126:10-131:15).

[2] The Tenth Circuit recognized that CERCLA's savings clauses do not preserve state law claims that frustrate CERCLA's NRD remedial scheme. First, 42 U.S.C. § 9614(a), provides that "[n]othing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." This makes clear that CERCLA operates as a floor, not a ceiling, in defining cleanup obligations. A State may place more stringent obligations on potentially responsible parties, and, under CERCLA, may recover the amounts necessary to restore, replace, or acquire the equivalent of an injured natural resource consistent with that stricter standard. *New Mexico*, 467 F.3d at 1246. Hence, this savings clause permits a state to expand the *amount* that may be recovered within CERCLA's remedial scheme, but does not allow recovery of *types of damages* falling outside it. Second, 42 U.S.C. § 9652(d) states that "[n]othing in this Chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants." This clause, the Tenth Circuit explained, "preserve[s] to victims of toxic waste the other remedies they may have under federal or state law." *New Mexico*, 467 F.3d at 1246. Thus, while CERCLA prescribes the measures of recovery for NRDs, it does not displace non-NRD remedies such as personal injury laws. *Id.*

treasury.'" *Id.* at 1247 (*quoting Puerto Rico v. S.S. Zoe Colocotroni*, 628 F.2d 652, 676 (1st Cir. 1980) (emphasis added)); *see also Ohio v. Dep't of Interior*, 880 F.2d 432, 444 (D.C. Cir. 1989) ("By mandating the use of all damages to restore the injured resources, Congress underscored in § 107(f)(1) its paramount restorative purpose for imposing damages at all."); 132 Cong. Rec. H9561, H9612-13 (Daily Ed. Oct. 8, 1986) ("The natural resource regime is not intended to compensate public treasuries. Nor are recoveries to be diverted for general purposes."). Rather, "the twin aims of CERCLA are to cleanup hazardous waste sites and impose the costs of such cleanup on parties responsible for the contamination." *Young v. United States*, 394 F.3d 858, 862 (10th Cir. 2005); *see also Gussack Realty Co. v. Xerox Corp.*, 224 F.3d 85, 91 (2d Cir. 2000) (*per curium*) ("CERCLA does not provide compensation to a private party for damages resulting from contamination."). CERCLA is thus restitutionary in nature in that a defendant must repair, restore, or replace what was injured. *Cf. Atlantic Richfield Co. v. American Airlines, Inc.*, 98 F.3d 564, 568 (10th Cir. 1996) ("response costs are … payments by responsible parties in restitution for cleanup costs.").

CERCLA's remedial scheme serves this restitutionary goal by narrowing the scope of available remedies and by prohibiting double recoveries, 42 U.S.C. § 9607(f), which has the effects of conserving resources and directing them exclusively towards environmental remediation. *New Mexico*, 467 F.3d at 1247. A plaintiff's measure of damages is carefully circumscribed by what is necessary to "restore, replace, or acquire the equivalent" of the injured natural resources, 42 U.S.C. § 9607(f)(1), and any recovery must actually be used for those purposes. In light of this purpose, the Tenth Circuit concluded, "CERCLA's comprehensive NRD scheme *preempts any state remedy designed to achieve something other than the restoration, replacement, or acquisition of the equivalent* of a contaminated natural resource."

New Mexico, 467 F.3d at 1247 (emphasis added).

As the Tenth Circuit recognized in *New Mexico*, to allow plaintiffs to avoid CERCLA's bar on unrestricted recoveries of costs, fees, and damages simply by seeking recovery under state law would frustrate CERCLA's remedial goals. Allowing awards untethered to the restoration or replacement of damaged natural resources would permit plaintiffs to siphon limited resources toward other uses. "Clearly, permitting the State to use an NRD recovery, which it would hold in trust, for some purpose other than to 'restore, replace, or acquire the equivalent of' the injured [resource] would undercut Congress's policy objectives in enacting 42 U.S.C. § 9607(f)(1)." *New Mexico*, 467 F.3d at 1248. Even if such a diversion never occurred in a particular case, state-law claims that would allow such diversion are preempted because CERCLA is designed to preclude other expenditures as a matter of law.[3] *Id.* Moreover, such an award would raise the potential for an impermissible double recovery, *id.* at 1248-49 (*citing* 42 U.S.C. § 9607(f)(1)), risking dissipation of assets and the possibility that insufficient funds will be available for effective remediation. *Id.* Because these results are inconsistent with CERCLA's purposes and damages scheme, such claims are pre-empted. *See also Montana v. Burlington N. & Santa Fe Ry*, 2008 Mont. Dist. LEXIS 38, at *13 (Mt. D. Ct. Feb. 14, 2008) (applying *New Mexico* preemption to Montana CERCLA analog statute, granting motion for partial summary judgment, limiting state tort public nuisance action to CERCLA remedies).

[3] In *New Mexico*, the state acknowledged that any award would not be used to restore natural resources. *New Mexico*, 322 F. Supp. 2d at 1259. The Tenth Circuit found this to be immaterial to CERCLA's preemptive effect. Under *New Mexico*, a defendant need not prove that the plaintiff *will* divert a damage award towards other purposes; rather it is the plaintiffs' *ability* to do so that clashes with CERCLA, which expressly prohibits the recovery of damages beyond those necessary for Congress' purposes and which expressly prohibits the expenditure of any award for other purposes. Preemption turns on the intentions of Congress, not the intentions of the plaintiff. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137-38 (1990).

2. CERCLA Preemption Attaches to any State Law Claim Seeking to Recover for Injury to Natural Resources Caused by a CERCLA Hazardous Substance but Does Not Depend on the Success of a CERCLA Claim

CERCLA preemption attaches to any state law NRD claim that could have been pursued under CERCLA – specifically, one that seeks to recover NRDs resulting from the release of a CERCLA-covered hazardous substance. Importantly, however, whether preemption attaches does not turn on whether a plaintiff actually prevails on its CERCLA claim. In *New Mexico*, for example, the New Mexico Attorney General had dismissed her CERCLA claim long before the case reached the Tenth Circuit, thereby "effectively ending any entitlement the State might have had to NRDs under CERCLA." *Id.* at 1237. Nevertheless, despite the absence of a viable CERCLA claim, her state law claims were still preempted because they sought to recover NRDs allegedly caused in whole or in part by alleged CERCLA hazardous substances, allegations that could have been pursued in the first instance under CERCLA subject to CERCLA's remedial scheme. Were the rule otherwise, a plaintiff could evade CERCLA's comprehensive remedial scheme by simply not pleading a CERCLA claim.

A plaintiff may lose or forfeit its CERCLA claim in any number of ways, from alleging the wrong CERCLA "facility," to failing to prove that the alleged "release" actually caused the alleged environmental injuries, to committing discovery violations. For example, in *New Jersey Turnpike Authority v. PPG Industries, Inc.*, the Third Circuit rejected a CERCLA claim that alleged that the entire eastern spur of the New Jersey Turnpike constituted a single "facility," linking together a number of discrete releases without demonstrating an appropriate "nexus" between them. 197 F.3d 96, 105 (3d Cir. 1999). Had the plaintiff there challenged each site or "facility" individually, a CERCLA claim may have been proper. While the error was fatal to the CERCLA claim, it did not leave the plaintiff free to use state law claims to recover damages not recoverable through a CERCLA claim. To allow otherwise would again facilitate evasion of

CERCLA's remedial scheme. CERCLA preemption thus attaches to any claim that, if properly pleaded, is of a type that could be pursued under CERCLA.[4]

Thus, the question in this case is not whether Plaintiffs' CERCLA claim *prevails*. Indeed, were the rule otherwise, the outcome in *New Mexico* would have been different, as the state's CERCLA claim had been irrevocably withdrawn at the time the issues were presented to the Tenth Circuit. Rather the question is whether CERCLA *applies*. The factual predicates to that determination are two-fold: (1) does the state law claim allege natural resource damages, and (2) does the state law claim allege that these NRDs were caused by the release of a CERCLA-covered hazardous substance? If both conditions are met, CERCLA preempts any state law damages claim for a recovery in excess of or otherwise outside CERCLA's remedial scheme.

B. Plaintiffs' State Law Claims for Nuisance (Count 4) and Trespass (Count 6) are Preempted by CERCLA's Comprehensive NRD Remedial Scheme

Under the foregoing principles, it is clear that several of Plaintiffs' state law claims are subject to CERCLA preemption. CERCLA preempts any state claim that (1) alleges natural resource damages, (2) purportedly caused by a CERCLA-covered hazardous substance, and which (3) seeks to recover damages or relief that is not strictly limited to repairing, replacing, or

[4] This distinction is well illustrated by *Pedre Company, Inc v. Robins*, 901 F. Supp. 666 (S.D.N.Y. 1995), and *Burger v. Empire Blue Cross and Blue Shield*, 2000 U.S. Dist. LEXIS 14010 (S.D.N.Y. Sep. 27, 2000), which address an analogous preemption scheme embodied in the Employee Retirement Income Security Act of 1974 ("ERISA"). ERISA broadly preempts any state law that "relate[s] to any employee benefit plan," 29 U.S.C. § 1144(a), including any state law that "threaten[s], directly or indirectly, ERISA's central goal of creating a nationally uniform system of pension plan regulation," but not state claims that "have only a 'tenuous,' 'remote' or 'peripheral' relation to plan regulation and administration." *Pedre*, 901 F. Supp. at 664-65 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 (1983)). The courts have dismissed claims that plainly related to plan administration, but not those where that relationship was as of yet ambiguous. *Pedre*, 901 F. Supp. at 665-66 & n.6; *Burger*, 2000 U.S. Dist. LEXIS 14010, at *5-6. In both cases the question was not whether the plaintiff would ultimately prevail on its ERISA claim but rather whether, based on the plaintiff's claims, ERISA clearly applied because the state law claims, meritorious or not, "related to" ERISA-covered subject matter.

purchasing the equivalent of the contaminated resource. Plaintiffs' claims for nuisance and trespass, both as pleaded and as factually presented on summary judgment, are preempted.

As pleaded, Plaintiffs' state law claims for nuisance, SAC ¶¶ 97-107, and trespass, SAC ¶¶ 118-126, fall squarely within *New Mexico*'s ambit. *First*, both claims plead NRDs. Plaintiffs' nuisance claim (Count 4) asserts that "as a result of their poultry waste disposal practices" Defendants have unreasonably interfered with the State's and public's "beneficial use and enjoyment of the IRW," specifically with its "biota, lands, waters and sediments," and have caused an "unreasonable and substantial danger to the public's health and safety in the IRW, including the lands, waters and sediments therein." *Id.* ¶¶ 98-99. Plaintiffs' trespass claim (Count 6) similarly asserts that "Defendants' poultry waste practices have resulted in an actual and physical invasion of and interference with the State of Oklahoma's possessory property interest in the water in" the IRW, requiring remediation of the "lands, waters and sediments therein." *Id.* ¶ 119. These are textbook NRD claims.

Second, Plaintiffs' nuisance and trespass claims allege that these NRDs were caused by CERCLA hazardous substances. Plaintiffs assert that Defendants are responsible for the excessive application of poultry litter to lands within the IRW, *id.* ¶¶ 47-50, and that this over-application "lead[s] to the run-off and release of large quantities of phosphorous and other hazardous substances, pollutants and contaminants" into the IRW. *Id.* ¶¶ 51-54. These substances, the Complaint alleges, include phosphorus/phosphorus compounds; nitrogen/nitrogen compounds; arsenic/arsenic compounds; zinc/zinc compounds; and copper/copper compounds, *id.* ¶ 57, each of which, Plaintiffs contend, has been designated as a hazardous substance under CERCLA, *id.* ¶¶ 60-61. Finally, the SAC alleges that the release of these substances into the environment threatens and has caused injury to "the biota, lands,

waters, and sediments" in the IRW," *id.* ¶¶ 56-59, and that these NRDs "are indivisible," *id.* ¶ 29.

Third, Plaintiffs' nuisance and trespass claims seek injunctive relief, NRD assessment and remediation costs, compensatory damages, punitive damages, and attorneys' fees and costs. *Id.* ¶¶ 104-107, 123-126. Plaintiffs also, for good measure, include a general request for "punitive and exemplary damages, to the maximum extent allowable under law." *Id.* § VI, ¶ 5. Under Oklahoma law, Plaintiffs are under no legal restriction as to how any damages, special, punitive or otherwise, must be used beyond the statutory and constitutional requirement that the damages must be deposited in the treasury for the legislature to appropriate. *See* 62 Okla. Stat. § 7.1.B ("It shall be the duty of each state agency, officer or employee, to deposit in the agency clearing account … all monies of every kind, including, but not limited to: … Income from … judgments … received by a state agency, officer or employee by reason of the existence of and/or operation of a state agency"). Thus, the punitive award sought is neither measured by the cost to, nor obliged to be used to, remediate, replace, or purchase the equivalent of any natural resource in the IRW. Rather, the State could use such funds for any purpose, including general expenditures and paying Plaintiffs' private lawyers the lucrative contingency fee already promised to them.

The SAC thus pleads what *New Mexico* clearly prohibits—an unrestricted award of money damages for NRDs allegedly caused by a CERCLA hazardous substance. As the Tenth Circuit held in *New Mexico*, such a claim "cannot withstand CERCLA's comprehensive NRD scheme." 467 F.3d at 1247-48. Plaintiffs' state law claims are thus defective as a matter of law.

Plaintiffs' recent defenses in briefing of their CERCLA claims now confirm that Plaintiffs purport to assert claims cognizable under CERCLA, even if those CERCLA claims are not ultimately successful. The parties have briefed summary judgment as to Plaintiffs' CERCLA

claims, *see* Defendants' Joint Motion for Summary on Counts 1 and 2, Dkt. No. 1872, at 8 (Feb. 18, 2009) ("CERCLA Motion"), and as to the statutes of limitation that apply to Plaintiffs' CERCLA NRD claim, Defendants' Joint Motion for Partial Summary Judgment as to Plaintiffs' Time Barred Claims, Dkt. No. 1876, at 9-10 (Feb. 20, 2009) ("Statute of Limitations Motion"). That briefing makes the bases for preemption clear.

Plaintiffs assert that they have properly pleaded a CERCLA claim. They assert that their evidence addresses various CERCLA hazardous substances, including "phosphorus, nitrogen, arsenic, zinc and copper (and compounds thereof)." CERCLA Opposition at 1-2, ¶ 4. They argue that the natural resources damages they allege were caused by the release of a CERCLA-covered hazardous substance. *Id.* at 10-15. And finally they continue to seek sweeping injunctive, monetary, and punitive relief for those injuries, remedies that go well beyond CERCLA's remedial scheme. SAC ¶¶ 104-107, 123-126, *id.* § VI, ¶ 5. Such a claim plainly triggers *New Mexico* preemption.

Plaintiffs' state law claims for an award in excess or outside of CERCLA's comprehensive NRD remedial scheme under state law nuisance and trespass theories are therefore preempted.

C. CERCLA Precludes Plaintiffs' Claim for Unjust Enrichment, Restitution and Disgorgement in its Entirety

Plaintiffs' claim of unjust enrichment, restitution and disgorgement, SAC ¶¶ 139-146, is likewise preempted. Here, Plaintiffs allege that Defendants "engaged in improper poultry waste disposal practices," SAC ¶ 140, from which they derived "enormous economic benefit and advantage … at great cost to the lands and waters comprising the IRW." *Id.* ¶ 141. These allegations similarly arise from Plaintiffs' contention that Defendants released CERCLA-covered hazardous substances into the environment, which caused indivisible injuries. *Id.* ¶¶ 29, 51-61.

Thus, this claim is preempted for the same reasons described above for Counts 4 and 6. While *New Mexico* did not specifically discuss unjust enrichment, restitution and disgorgement, the Tenth Circuit's reasoning illustrates that these state-law remedies undercut CERCLA's comprehensive natural resource scheme.

Unjust enrichment, restitution, and disgorgement are related equitable remedies. As Oklahoma courts have recognized, "[t]he unifying theme of [these] various restitutionary tools is the prevention of unjust enrichment." *Warren v. Century Bankcorporation, Inc.*, 741 P.2d 846, 852 (Okla. 1987) (emphasis deleted). "[R]estitution rests on the ancient principles of disgorgement [which] is designed to deprive the wrongdoer of all gains flowing from the wrong rather than to compensate the victim of the fraud." *Id.* Restitution was created to "put the parties back into the position in which they were before" or for "the prevention of unjust enrichment." *Id.*; *see also Tull v. United States*, 481 U.S. 412, 424 (1987) ("Restitution is limited to 'restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant.'") (*quoting Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946)). This measure of damages conflicts with CERCLA's limited remedial scheme.

As noted above, CERCLA carefully prescribes how natural resource damages are to be measured. *See* 43 C.F.R., Part 11. This system of measurement takes no account of the defendants' profits (or lack thereof) but focuses exclusively on the cost to repair, replace, or purchase the equivalent of a contaminated natural resource. *See id.*; 42 U.S.C. § 9607(f); *New Mexico*, 467 F.3d at 1244-45. In contrast, unjust enrichment, restitution and disgorgement are measured by reference to a defendant's gain and do not follow the damage calculation methodology carefully crafted by Congress and the EPA. By focusing on a defendant's alleged gains, unjust enrichment, restitution, and disgorgement seek to punish a defendant for wrongfully

gained profits. *See Warren*, 741 P.2d at 852 ("In modern legal usage [disgorgement] has frequently been extended to include a dimension of deterrence") (citation omitted); SAC ¶ 146 ("the State of Oklahoma is entitled to disgorgement of all gains the Poultry Integrator Defendants realized in consequence of their wrongdoing.").

By setting the measure of damages as the amount of Defendants' allegedly ill-gotten gains, the remedies of unjust enrichment, restitution and disgorgement conflict with CERCLA's mandate that natural resource trustees recover whatever amount is required to replace or restore damaged natural resources (and no more) and introduce a punitive measure of damages foreign to CERCLA. *Compare New Mexico*, 467 F.3d at 1245-47 (CERCLA's purpose is remedial), *with Warren*, 741 P.2d at 852 (disgorgement "is said to occur when a 'defendant is made to 'cough up' what he got, neither more nor less.") *(quoting* Dobbs, Handbook on the Law of Remedies § 12.1, p. 792 (1973), *and* Restatement of Restitution § 1, cmt. a ("if the loss differs from the amount of benefit received, the measure of restitution may be more or less than the loss suffered or more or less than the enrichment")).

While an award under CERCLA would be strictly targeted towards remediating the allegedly injured natural resources, *cf. Atlantic Richfield Co.*, 98 F.3d at 568 ("response costs are … payments by responsible parties in restitution for cleanup costs."), any recovery under an unjust enrichment, restitution or disgorgement theory would not be so encumbered. This avenue of recovery would also raise the potential of a prohibited double recovery. Under CERCLA there can be no double recovery because any funds are used exclusively to repair or replace the injured natural resource. In contrast, should Plaintiffs obtain an award under one of these equitable theories, the award need not be spent on natural resources and thus another litigant may sue to remediate the same alleged injury. Entertaining this claim, then, risks depleting

Defendants' assets to provide unrestricted funds to Oklahoma, at the expense of a CERCLA-compliant cleanup.

Plaintiffs' claim in Count 10 for unjust enrichment, restitution, and disgorgement thus violates three of Congress' mandates regarding natural resource damages: (1) such damages shall be measured according to a carefully-structured system that focuses exclusively on the natural resources; (2) any resulting damage award must be subject to CERCLA's legal obligation that the money be used solely to replace or restore natural resources; and (3) the state shall not receive a windfall from this process. *New Mexico*, 467 F.3d at 1247 ("The ultimate purpose of any such remedy should be to protect the public interest in a healthy, functioning environment, and not to provide a windfall to the public treasury.") (quotation, emphasis, omitted). For all the reasons set out above with regard to Counts 4 and 6, Count 10 is also preempted.

D. CERCLA Preempts Oklahoma's General Demand for Exemplary and Punitive Damages

Under the Tenth Circuit's holding in *New Mexico*, Plaintiffs' demand for exemplary and punitive damages based on NRDs is particularly inappropriate. If unrestricted compensatory damages frustrate CERCLA's remedial scheme, *a fortiori*, punitive and exemplary awards must be excluded. "[C]ompensatory and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). Punitive damages are in no way linked to the restoration or replacement of injured natural resources, but "are aimed at deterrence and retribution." *Id.*

As with Oklahoma's other requested forms of monetary relief, the award of punitive damages is a "state remedy designed to achieve something other than the restoration, replacement, or acquisition of the equivalent of a contaminated natural resource," and is thus preempted by CERCLA. *New Mexico*, 467 F.3d at 1247. CERCLA is a strict liability scheme

that has an exclusive remedial system for addressing injury to natural resources. *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1078 n.18 (9th Cir. 2006). Under CERCLA, punitive damages are authorized only in very limited circumstances which are not present in this case and which are specifically designed to accomplish the goal of compliance with the EPA's cleanup decisions. *See* 42 U.S.C. § 9607(c)(3) (allowing punitive damages, capped at three times cleanup costs, where a potentially responsible party refuses to adhere to an EPA order issued under 42 U.S.C. §§ 9604 or 9606 without "sufficient cause").

In seeking a remedy for the purpose of punishment and retribution, Plaintiffs have gone beyond the remedies permitted by CERCLA's comprehensive scheme. *See New Mexico*, 467 F.3d at 1247. Like unrestricted compensatory damage awards, an award of punitive damages would undermine Congress' mandate that "the ultimate purpose" of a remedy for injury to natural resources "should be to protect the public interest in a healthy, functioning environment, and not to provide a windfall to the public treasury." *New Mexico*, 467 F.3d at 1247 (quotation omitted). In enacting a strict liability statute, Congress did not design CERCLA either to punish those who allegedly damage natural resources or to pay for private plaintiffs' lawyers.

Finally, even if CERCLA did not directly preempt Plaintiffs' claim for punitive damages, *New Mexico*'s holding that CERCLA preempts state law claims for compensatory damages in this context nevertheless bars this attempt to recover punitive damages. Where, as here, a federal statute extinguishes a state law action for compensatory damages, any contingent right to punitive damages is similarly extinguished. *See Virgilio v. City of New York*, 407 F.3d 105, 117-18 (2d Cir. 2005); *Aubertin v. Bd. of County Comm'rs*, 588 F.2d 781, 786 (10th Cir. 1978) (punitive damages cannot be recovered where there is no award of compensatory damages); *Kerr-Selgas v. American Airlines, Inc.*, 69 F.3d 1205, 1214 (1st Cir. 1995) ("generally a claimant

may not recover punitive damages without establishing liability for either compensatory or nominal damages"). Accordingly, even if *New Mexico* did not require the preemption of Plaintiffs' punitive damage claims, CERCLA's preemption of Plaintiffs' underlying state-law claims for compensatory damages requires that the request for punitive damages be dismissed.

E. CERCLA Preemption of State Law Claims Must be Considered Regardless of How the Court May Rule on Other Pending Summary Judgment Motions

As noted, the parties have fully briefed summary judgment as to Plaintiffs' CERCLA claims, CERCLA Motion, Dkt. No. 1872, and the statute of limitations that governs Plaintiffs' CERCLA NRD claim, Statute of Limitations Motion, Dkt. No. 1876, at 9-10. The Court's resolution of these motions may, but does not necessarily, alter the impact of CERCLA preemption analysis under the present motion.

First, if the Court denies Defendants' CERCLA Motion and Statute of Limitations Motion and permits Plaintiffs' CERCLA claims to proceed to trial, then *New Mexico* preemption plainly attaches to Plaintiffs' state law claims for the reasons set out above. In that instance, the Court will have determined that the factual allegations that underlay all of Plaintiffs' claims may support a CERCLA claim. *New Mexico* holds that Plaintiffs cannot use state law claims to seek a broader recovery based on those same facts.

Second, even if Plaintiffs' CERCLA claims do not go forward, *New Mexico* preemption may still apply. As the Tenth Circuit recognized in *New Mexico*, the fact that the Attorney General had dismissed her CERCLA claim did not prevent CERCLA's remedial scheme from preempting state law claims based on allegations that could have been pursued under CERCLA. *New Mexico*, 467 F.3d at 1237. Plaintiffs have acknowledged as much. As they noted in their opposition to Defendants Summary Judgment Motion,

> Even if the Court were to limit the State's CERCLA claim for natural resource damages, the State can still recover all of its natural resource damages not inconsistent with CERCLA under state law. *See New Mexico v. General Electric Co.*, 467 F.3d 1223, 1247-48 (10th Cir. 2006) (holding that CERCLA's savings clauses permit state-law recovery of natural resource damage so long as the state law does not conflict with CERCLA's monetary-recovery restrictions).

Statute of Limitations Opposition, Dkt. No. 1917, at 6 n.4 (Mar. 10, 2009).

Plaintiffs are correct. To the extent that they have attempted to demonstrate a claim that, regardless of its defects, could have been pressed under CERCLA, *New Mexico* preemption applies. For example, Defendants have demonstrated that Plaintiffs failed to plead a proper CERCLA facility. *See* CERCLA Motion at 18-25; CERCLA Reply at 8-10. While fatal to Plaintiffs' claims here, this deficiency does not free Plaintiffs to pursue state law remedies that would be foreclosed to them under CERCLA. Holding otherwise would undercut *New Mexico* by allowing litigants readily to escape CERCLA's remedial scheme by intentionally mispleading CERCLA's "facility" requirement. *New Mexico*, 467 F.3d at 1247-48. Similarly, as Plaintiffs acknowledge, the fact that their natural resource damages claim under CERCLA is time barred, *see* Statute of Limitations Mot. at 9-10; Statute of Limitations Opp. at 6 n.4, does not free them to pursue unlimited state law remedies, unbounded by CERCLA's comprehensive NRD remedial scheme. To hold otherwise would be to allow litigants to evade CERCLA's remedial scheme simply by letting CERCLA's 3-year limitations period expire before proceeding under longer state law statutes of limitations.

Were the allegations underlying Plaintiffs' claims of a sort not susceptible to treatment under CERCLA, then perhaps *New Mexico* preemption would not apply. However, to the extent that Plaintiffs' CERCLA NRD claim fails on account of a defect as described above, *New Mexico* preemption remains fully in force.

F. Plaintiffs' Claim for Federal Common Law Nuisance (Count 5) Must Also be Dismissed as Displaced by CERCLA

Finally, Plaintiffs' claim under the federal common law of nuisance (Count 5) also must be dismissed as any such claim is displaced by CERCLA's NRD remedy. In enacting CERCLA, Congress established a comprehensive federal scheme and policy for the identification, remediation, recovery for, and restoration of injuries to natural resources caused by CERCLA-covered hazardous substances. This scheme displaces any activity by federal common law in that same area.

As the Supreme Court has made clear, "Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981). Thus, federal common law is the narrow exception, not the rule. *See id.* at 312-13; *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) (rejecting general federal common law in favor of deference to state common law). Even where federal common does persist, it is limited to "few and restricted" areas, *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981), and always "subject to the paramount authority of Congress," *City of Milwaukee*, 451 U.S. at 313-14 (1981) (quotation omitted). Indeed, whereas federal judicial displacement of state law is disfavored, displacement of federal common law by federal statutory law is favored. *Id.* at 316 & 317 n.9.

Previously existing federal common law gives way to and is displaced by Congress's substantive legislation when "the scheme established by Congress addresses the problem formerly governed by federal common law." *Milwaukee*, 451 U.S. at 315 n.8. For example, in *Milwaukee*, the Supreme Court recognized that the 1972 amendments to the Federal Water Pollution Control Act constituted "a 'total restructuring' and 'complete rewriting' of the existing water pollution legislation." *Id.* at 317 (quoting legislative history). Such a comprehensive

scheme "strongly suggests that there is no room for courts to attempt to improve on that program with federal common law," *id.* at 319, and therefore displaced preexisting federal common law. This doctrine recognizes that courts should yield in matters involving "high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot." *Texas Indus.*, 451 U.S. at 647 (*quoting Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980)). The standard for such displacement is low. The federal courts need only find that Congress has "spoken to [the] particular issue," *Milwaukee*, 451 U.S. at 313, and the courts approach this analysis with a ready "willingness to find congressional displacement of federal common law." *Id.* at 317.

Plaintiffs' Count 5 claim for federal common law nuisance seeks to recover *inter alia* injunctive, monetary damages, and punitive damages. SAC ¶¶ 108-117. While Defendants maintain that there is no federal common law applicable to this area, *see* Tyson Foods, Inc.'s Motion to Dismiss Counts 4-10 of the First Amended Complaint, Dkt. No. 66, at 21-22, even assuming *arguendo* that such an common-law action did previously exist, it now certainly is displaced by CERCLA's NRD provisions.

As the Tenth Circuit explained, CERCLA, 42 U.S.C. § 9607(f)(1), and its implementing regulations detail what amounts may be recovered for damages to natural resources, by whom, and how recovered damages must be spent (*i.e.*, "only to restore, replace, or acquire the equivalent of such natural resources by the State"). State trustees (and courts in cases brought by state trustees) are guided by EPA regulations defining how natural resource damages are defined, assessed, valued, and remediated. 42 U.S.C. § 9607(f)(2)(C); 42 U.S.C. § 9651(c). Given "CERCLA's carefully crafted NRD scheme," which reflects "Congress' considered judgment as to the best method of serving the public interest in addressing the cleanup of hazardous waste,"

New Mexico, 467 F.3d at 1247, Congress has expressly and clearly "spoken to [the] issue" of suits to remedy injuries to natural resources. By legislating in this area, Congress has filled any void that federal common law could have filled.

Thus, as the Court recognized when Defendants moved previously to dismiss certain claims pursuant to *New Mexico*, "if CERCLA does apply … federal common law is out." Ex. 1 (Jun. 14, 2007 Hrg. T. 6:17-19). Hence, to the same extent and under the same conditions that *New Mexico* preemption applies to Plaintiffs' state law claims as described above, so too does CERCLA's comprehensive remedial scheme displace Plaintiffs' federal common law claim.

CONCLUSION

For the foregoing reasons, Defendants respectfully move the Court for an order of partial summary judgment.

Respectfully submitted,

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